

Role of al- Qawā'i'd al-Fiqhiyya (Islamic Legal Maxims) in ijtihād

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Abstract

Legal maxims are an imperative contrivance to comprehend the nature and objectives of the Shari'ah. Legal maxims (al-qawā'id al-fiqhiyya) are theoretical abstractions, usually in the form of short epithetical statements, that are expressive, often in a few words, of the goals and objectives of the Shari'ah. Ijtihād means derivation of legal rules and principles from the detailed sources of Islamic law. Among many other conditions for being entitled to exercise ijtihad, a firm command on Islamic legal maxims is one of the basic requirements. These qawā'id are used by the contemporary jurists for supporting their preferred legal rulings (ikhtiyārāt fiqhiyya) on certain matters. Ijtihād have always been the most significant way to extract legal rulings for new situations and these qawā'id serve as a tool for providing solutions to them.

Key Words: Tools of ijtihād, contemporary ijtihād, uṣūl al-fiqh

Legal maxims are an imperative contrivance to comprehend the nature and objectives of the Shari'ah. They had a dormant development during the course of history of Islamic legal thought. Legal maxims (al-qawā'id al-fiqhiyya) are theoretical abstractions, usually in the form of short epithetical statements, that are expressive, often in a few words, of the goals and objectives of the Shari'ah. These legal maxims were derived by the jurists from the detailed rules of *fiqh* on different subjects, and developed into short abstract statements of principles.¹

Ijtihad means derivation of legal rules and principles from the detailed sources of Islamic law.² The word *juhd* is explained by different jurists in two different meanings. Some using (j) with nominative case explains its meaning as effort, while in acquisitive case they term it as hard work. While some other scholars use the word interchangeably in both meanings. It can be inferred from the scholars' discussion of the morpheme '*juhd*', that it is exercising maximum effort to in search of legal opinion for the novel cases that do not have any explicit ruling of shari'ah on the subject.³ Therefore, ijtihad basically aims at finding feasible solutions to new issues, which have not been specifically addressed by the existing law.⁴ Thus ijtihad is that dynamic force in legal studies that helps make Islamic law as a body of positive rules.⁵

Though Ijtihad is a valid source of Islamic Law and there are number of traditions and Qur'anic verses in support of it, however it has a broader perspective as many secondary sources of Islamic law are mere manifestations of *ijtihād*. '*Ijmā'* (consensus of Jurists), *qiyās* (analogical reasoning), *istiṣlāḥ* (consideration of *maṣlaḥa*), *istihsān* (public benefit) are different examples of it. The basic function of *ijtihād* is to provide legal ruling over the matters that are not covered by the texts, to give flexibility to Islamic law and to show its pragmatism. The person practicing *ijtihād* must possess certain characteristics to make it a

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valid practice instead of mere tool in the hands of unauthorized persons. The conditions for being entitled to exercise *ijtihad* include; being well-versed in Arabic language, having a deep understanding of Qur'anic verses and traditions of the Holy Prophet (SAW), command on *nāsikh wal mansūkh*, mastery on '*ilm al-riwāya wal dirāya*', complete knowledge of previous *ijtihādāt* and precedents of companions as well as their predecessors, knowledge of objectives of shari'ah and *maṣāliḥ al-mursala*, 'urf and customs, Islamic legal maxims, and piety and devotion.

Tools of Ijtihād: Triangle of al-Qawā'id al-Fiqhiyya, Uṣūl al-Fiqh and Maqāṣid al-Shari'a

There seem to have a number of requirements to exercise *ijtihād* but they can all be summarized into three broader categories which serve as tools to exercise *ijtihād*; namely *uṣūl al-fiqh*, *maqāṣid al-Shari'a* and *al-qawā'id al-fiqhiyya*. Most of the conditions required for *ijtihād* relate to the knowledge of *uṣūl al-fiqh* (the science of legal methodology), since these elements are amongst the research subjects of *uṣūl*. The concept of *maṣlaḥa* and the doctrine of *maqāṣid al-Shari'a* are quite similar. 'Urf relates to, and is studied within the scope of *al qawā'id al-fiqhiyya*, *maṣlaḥa* and *uṣūl al-fiqh*. Thus it can be safely concluded that knowledge of these three genres is very significant in order to qualify as a *mujtahid*.

Uṣūl al-fiqh, is a device that provides rules and principles regarding the methodology which has to be followed for deducing legal rules from the basic sources of Qur'an and Sunnah.⁶ It provides guidance to the jurists, while extracting rules on situations that have no explicit order in the Basic Code i.e. Qur'an and Sunnah, by suggesting the correct procedure and criterion to do *ijtihād*.⁷ *Ijtihād* and *uṣūl al-fiqh* have an important interlinked relation; as legal reasoning, application of rules of interpretation and understanding the meaning and implications of Shari'a rules are the subjects shared by both entities. In this manner, the methodology of *uṣūl al-fiqh* also serves as a filter to the exercise of *ijtihād* only to the persons fulfilling the pre-requisites of *mujtahid*, in order to benefit from the textual commands by means of preference and judgment.⁸

Maqāṣid al-Shari'a is an important tool for exercising *ijtihād*. According to al-Shāṭībi, it is an important pre-requisite for eligibility for being a *mujtahid*. He said: "None to be qualified as *mujtahid* unless he has entirely mastered *maqāṣid al-shariah*, and is capable of inferring legal provisions based on his understanding of *maqasid*".⁹

Another scholar having significant research in the field of maqasid I shariah, Tahir ibn Āshūr (1393 / 1973), has also reiterated the importance of employment of maqasid for doing *ijtihād* in all its manifestations. Those who limited their *ijtihād* to the literal interpretations of the texts are more prone to errors as this is out of line with the general spirit and purpose of the surrounding evidence.¹⁰ *Ijtihād* is done for extracting rules for novel situations that had not occurred in the past, and the analogical nature of these *qawa'id* helps the *mujtahidun* to extract rules by the use of legal reasoning where he recognize the illah of the original case that is covered by the text and apply it to the new case that has not been regulated by a clear *nass* (from Quran and Sunnah) on the basis of common effective cause. A *mujtahid* also infer a legal ruling from a *qa'idah fiqhīyyah* that requires only checking whether or not the new case is in the domain of the *qa'idah*, which is similar to finding illah¹¹ as explained above during the practice of *qiyyas*.¹² For this reason, some scholars contend that *qawa'id* are to be given priority over *qiyyas*. According to them, in exercising *qiyyas*, one case is attached to

another case with legal ruling; while qawaiid attach a single issue to several other issues, which already have legal status.¹³

Though the scholars who mentioned the importance of knowledge of qawaiid for the exercise of Ijtihad are not many; but the ones who reiterated its importance are of very high stature. Al-Shafi (d. 204 / 819), the pioneer to write about the requirements of legal reasoning has focused its importance. Al-Subki (d. 771 / 1370), another renowned scholar whose book Jam al-Jawami is amongst the renowned works in this regard, has considered acquaintance to qawaiid as an indispensable proviso for valid ijtihad.¹⁴

Role of al-Qawaiid al-Fiqhiyyah in Contemporary Ijtihad

The situations and cases that are novel and there are no legal rules present to provide solutions for them are termed as *Sawafi al umur* and the discipline of fiqh that deals with such cases having no precedent is called *fiqh al-nawazil* which is the legal process to make use of intellectual efforts to find out the legal rules from the different sources of fiqh. *Fiqh al-nawazil* deals only with finding out the rules for cases having no solutions in fiqh literature.¹⁵ It is important to mention here that there are few conditions to be met for titling the cases as per fiqh al-nawazil; first, that are new issues and never been discussed before, second, the issues must not be speculated or hypothetical, rather they must be real, third, there is an urgent need to address the issue for any solution.¹⁶ A number of researches on this discipline of fiqh include significant books like, *Al-Ilam Bi-Nawazil al-Ahkam* by Abu al-Asbagh al-Asadi (d. 486 / 1093), *al-Nawazil* by ibn Rushd (d. 520 / 1126) and *Madhahib al-Hukkam Fi Nawazil al-Ahkam* by al-Qadi Iyad (d. 544 / 1150).¹⁷

Classical literature on Qawaiid al Fiqhia include most significant books like *Takhrij al-Furu'* *ala al-Usul* by Jamuludeen 'Abd al-Rahman bin al-Hassan al-Isnavi, *Anwar al-Buruq fi Anwa'* *al-Furuq* by Abu Abbas Ahmad al-Sanhaji (al-Qarafi), *Al-Asybah wa al-Naza'ir* by Jalaluddin al-Suyuti and *al-Asybah wa al-Naza'ir* by Ibn Nujaym.

While *Al-Madkhali al-Fiqhi al-'Amm* by Ahmad Mustafa al-Zarqa', *Al-Wajiz fi 'Iidah Qawa'id Fiqh al-Kulliyah* by Dr. Shidqi Muhammad ibn Ahmad al-Burnu, *Al-Nazariyyah al-Fiqhiyyah* are books from modern literature that have great significance in the field of qawaiid.

In the present era there are numerous *nawazil* featuring problems from all aspects including medicine, finance, education and culture and categorizing them into *wajib*, *mandub*, *mubah*, *makruh* or *haram*. Many researches have been conducted in this regard employing qawaiid in finding out the solutions to *nawazil* and a number of articles are available relating to contemporary issues on Islamic finance and related topics.¹⁸

Recently, a number of contemporary medical issues in Islamic perspective have been dealt with articulate manner in a book written by Ali al-Qarahdaghi and Ali al-Muhammadi in Beirut (2006). In the same way, a Council of *Majma al-Fiqh al-Islami* (the Islamic Fiqh Academy) has been established under OIC (Organization of Islamic Cooperation) to discuss the newly erupting issues of the contemporary era like test-tube babies, milk banks, insurance and re-insurance, and the letter of guarantee.¹⁹ AIDS, currency issues, and calls for bids²⁰ health insurance and legal rulings of Muslim minorities were amongst the issues discussed in the meetings of the Council.²¹

Ijtihad have always been the most significant way to extract legal rulings for *nawazil*. Different modes of ijtihad are employed in this regard including *qiyas*, *istihsan*, *istishab*, *maslahah* etc. An important requirement for being a mujtahid, as discussed earlier, is knowledge of qawaiid al fiqhia. These qawaiid have helped jurists to extract legal rulings for

nawazil by means of their analogical nature as well as their applicability on a number of issues simultaneously. In the present era too, qawaids are employed to find solutions for novel problems. Thus present legal scholarship demands that maqasid and qawaids may be jointly used with usul ul fiqh that alone has not been adequately responding to the demands of renewal and ijтиhad in the era of statutory legislation.

These qawaids are used by the contemporary jurists for supporting their ikhtiyarat fiqhīyyah (preferred legal rulings) on certain matters. These qawaids are quoted either in justification or while invalidating the case, e.g. in the contract of tamin (insurance), the qaidah of dararah (necessity) and of adah (custom) are referred by the jurists who deemed such a contract as valid.²² In the same way, a certain qaidah is given to support the permissibility,²³ e.g. for organ transplantation, the universal qaidah of intention (i.e. *al-umaru bi-maqasidiha*) is used to support their view from different aspects.²⁴

The use of qawaids has become a common practice to extract the legal rulings for the newly emerged problems, by means of ijтиhad. In a conference held in Algeria in 2011 significant researches employing different qawaids include papers titled *al-\$awabit wal- Qawaids al-Shariah-l-Muamalat al-Maliyyah al-Muasirah* (legal maxims and rules for modern financial transactions) by Ismail Khalidi; *Al-Qawaids al-Fiqhiyyah wa Atharuha fi-l-Muamalat al-Maliyyah* (impact of legal maxims on financial transactions) by Mahmud Mhaidat; *Qawaids al-Siah wal-Murunah wa-Tatbiqatuha al-Iqtisadiyyah* (maxims of latitude and flexibility and their applications to economic issues) by Anas Ghbariyyah.²⁵ Similarly, research papers related to the application of qawaids al fiqhia to medical issues were presented in a seminar in Riyadh in 2008.²⁶ “*Tatbiq al-Qawaids al-Fiqhiyyah Ala Masail al-Takhdir al-Muasirah*” (application of legal maxims to contemporary issues in anesthetization) by Ab al-Salam al-Hasin; “*Qaidat a darara wa la dirara Wa tatbiqatuha al-Tibbiyyah*” (application of the maxim “let there be no infliction of harm nor its reciprocation” to medical issues) by Ayid al-Shahrani; “*Athar al- Qawaids al-Fiqhiyyah fi Bayan Ahkam al-Jirahat al-Tajmiliyyah*” (impact of legal maxims on extracting legal determination for cosmetic surgery) by Iyad al-Sulami were some important researches presented there.

University dissertations topics vary from *Al- Qawaids al-Fiqhiyyah al-Munazzimah Lil-Muamalat al-Maliyyah al- Islamiyyah* (legal maxims which organize Islamic financial transactions) by Atiyyah Adlan Ramdan, (Master's thesis, Alexandria University, 2006;²⁷ *Al-Tatbiqat al-Fiqhiyyah li-Qaidat al-Yasir Mughtfas fil-Buyu'* (application of a maxim “little (mistakes, misuse, etc.) are forgiven” to issues in the chapter of sale) by Hakya Bin Muhammad Karunitsh, Masters dissertation, Imam Muhammad ibn Saud University, Riyadh, 2009;²⁸ *Al-Qawaids al-Kulliyyah al- Kubra wa-Atharuhi fil-Muamalat* (universal maxims and their application to transactions) by Omar Kamil, a PhD thesis, al-Azhar University, 2009.

The application of qawaids on fiqhī issues is very significant for ijтиhad. For example, a well-known qaidah reads: “*al-tasarruf ala al-riyyah manut bi-l-maslahah*” (Management of the public or citizens must be governed by the public interest). Originally this qaidah connotes that the ruler (hakim) is responsible for the welfare of the people in making all decisions. The word “*riyyah*” can be generalized into any head of institution who is responsible for the well being of all his staff and employees as well as its scope can be widened to hold him responsible for taking into consideration the welfare of public as well while making decisions for his firm or organization. Thus according to jurist this qaidah can be applied in specific as well as in general terms.²⁹

Another qaidah “*alkitab ka-l-khitab*” (meaning: correspondence resembles conversation) traditionally used for commercial contracts, such as sale, hiring, mortgage, etc. According to jurists (*mujtahideen*) it can be used for validating the sale contracts or divorce or any legal transaction in the present era on the correspondence through email, SMS or any other modern means of communications. Thus jurists in present era have argued to accept different sorts of electronic communication as ways of documentation, which should also be binding and result in whatever consequences.³⁰

Conclusion

Islamic legal maxims are extracted from the Islamic jurisprudence (*fiqh*) that comprises all aspects of life of a Muslim, i.e. rituals, worldly dealings and financial issues. Islamic jurisprudence deals with the practical aspects and specifies man's rights and obligations based on certain jurisprudential maxims. The employment of these maxims while exercising Ijtihad had been an important tool of the jurists to extract legal rulings. The jurists must have a good command over these legal maxims, since these maxims and principles have been derived from the fundamental sources of Islamic jurisprudence. The application of qawaid on new situations has given new dimensions and pragmatism to Islamic law.

Endnotes

¹ Mohammad Hashim Kamali, *Qawa'id Al-Fiqh: The Legal Maxims Of Islamic Law*, The Association Of Muslim Lawyers, p.1

² Bernard Weiss, “The Theory of Ijtihad”, in: the American Journal of Comparative Law Vol. 26, No. 2, (spring, 1978), pp. 199-212, p.200

³ Wael B. Hallaq, “Was the Gate of Ijtihad Closed? In: International Journal of Middle East Studies, Vol. 16, No. 1 (Mar., 1984), pp. 3-41, p.3

⁴ Mohammad Hashim Kamali, “Issues in the Legal Theory of Usul and Prospects for Reform” in: Islamic Studies, Vol. 40, No. 1 (Spring 2001), pp. 5-23, p.6

⁵ Bernard Weiss, “The Theory of Ijtihad”, American Journal of Comparative Law Vol. 26, No. 2, (spring, 1978), pp. 199- 212

⁶ Al-Nadawi, al-Qawaid, 69

⁷ Ibid. 14

⁸ Kamali, Principles, 13

⁹ Al-Shatibi, al-Muwafaqat, 4:106

¹⁰ Ibn Āshar, Maqasid, 15-16; See also: Mohammad Hashim Kamali, “Maqasid al- Shari'ah”: the Objectives of Islamic Law”, in: Islamic Studies, 38:2 (1999), pp. 193-208, p.205

¹¹ Al-Shatibi, al-Muwafaqat, 4:106

¹² Rashed al-Amiri, Legal Maxims, 85

¹³ Al-Khalifi, al-Qawa'id al-Fiqhiyyah: |ujjiyyatuha, pp. 311-314

¹⁴ Ibid.

¹⁵ Muhammad Al-Jizani, Fiqh al-Nawazil: Dirasah Taliyyah Tatbiqiyyah, Second Edition, (Dammam: Dar Ibn al-Jawzi, 2006), pp: 1:20-22

¹⁶ Ibid. pp. 1:22-23

¹⁷ Ibid.

¹⁸ Dar ul Nifas in 1998, published 30 articles with title, *Buhuth Fiqhiyyah fi Qadaya Iqtisadiyyah Muasirah*

¹⁹ Majallat al-Majma al-Fiqhi (the journal of the Fiqh Academy), Vol. 2, No. 1:233; Vol. 2, No. 1:383; Vol. 2, No. 1:545; Vol. 2, No. 2:1035 respectively

²⁰ Majallat al -Majma', Vol. 3 No. 3:1650; Vol. 5 No. 3:1609; Vol. 8, No. 3: 9; Vol. 9, No. 1:65 respectively

²¹ Resolution No. 149 (16 / 7) at: <http://www.fiqhacademy.org.sa/qararat/16-7.htm>; resolution No. 151 (16 / 9) at: <http://www.fiqhacademy.org.sa/qararat/16-9.htm>

²² Atiyyah Adlan Ramdan, Mawsū'at al-Qawa'id al-Fiqhiyyah al-Muna&&imah Li-l-Muamatat al-Maliyyah al-Islamiyyah, (Alexandria, Dar al-Aman, 2007), 214

²³ Muhammad al-Shinqiti, Ahkam al-Jirahah al-ibbiyyah, 2nd Ed, (Jeddah, Maktabat al-Sahabah, 1994), pp. 354-391

²⁴ Ibid. pp. 428-434

²⁵ <http://iefpedia.com/arab/?p=25065> ; <http://iefpedia.com/arab/?p=25106> ;

²⁶ http://www.alssunnah.com/main/articles.aspx?article_no=2317

²⁷ Alexandria: Dar al-man, 2007

²⁸ The thesis is still unpublished. <http://iefpedia.com/arab/?p=7075>

²⁹ Y. Ismail, and A. Abozaid. (2007). Management Concepts and Islamic Legal Maxims: An Analysis of Selected 'Usul Al-Fiqh and Al-Qawa'id Al-Fiqhiyyah Books, International Conference on Management from Islamic Perspectives (ICMIP-2007), IIUM, at Hilton Kuala Lumpur, Malaysia, 15-16 May

³⁰ Haydar, Durar al-Hukkam, 1:61

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